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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ADELL H. SHERBERT, *Appellant*,

v.

CHARLIE V. VERNER, ED. H. TATUM, ROBERT S. GALLOWAY, SR., as members of SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION and SPARTAN MILLS,
Respondents.

On Appeal from the Supreme Court of South Carolina

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

Appellant appeals from the judgment of the Supreme Court of South Carolina entered on May 17, 1962, affirming a decree of the Court of Common Pleas of Spartanburg County, South Carolina.

OPINIONS BELOW

The "decree" (opinion) of the Court of Common Pleas of Spartanburg County, South Carolina (App., *infra*, pp. 1a-7a) is not officially reported. The opinion of the Supreme Court of South Carolina (App., *infra*, pp. 8a-25a) and the dissenting opinion (App., *infra*, pp. 26a-39a) are reported in 125 S.E. 2d 737. They are not yet officially reported.

JURISDICTION

The "decree" (and opinion) of the Court of Common Pleas was entered June 27, 1960 (Tr. 3, 29; App., *infra*, pp. 1a, 10a).[1] The opinion of the Supreme Court of South Carolina, which also constitutes its final judgment[2] was filed and entered May 17, 1962 (Tr. 41; App., *infra*, p. 8a). Appellant filed notice of appeal August 15, 1960. This Court has jurisdiction of this appeal under 28 U.S.C. sec. 1257(2). *King Manufacturing Co.* v. *City Council of Augusta*, 277 U.S. 100; *Hamilton* v. *Regents of University of California*, 293 U.S. 245, 257-258; *Lathrop* v. *Donohue*, 367 U.S. 820, 824.

QUESTIONS PRESENTED

Whether, where a state unemployment compensation law requires as a condition precedent to eligibility for unemployment compensation that an applicant be "available for work" and further provides for disqualification for a stated number of weeks if the appli-

[1] Herein, "Tr." refers to the record certified to this Court by the Clerk of the Supreme Court of South Carolina, including the proceedings therein.

[2] The covering certificate of the record by the Clerk of the Supreme Court of South Carolina, in pertinent part, states that the "opinion [of the Supreme Court of South Carolina] is the final judgment of this court" (Tr., unnumbered first page).

vant fails, without good cause, to "accept available suitable work," and such statute is construed and applied to make ineligible and to disqualify a woman who, in the practice of her religious belief, as a member of the Seventh-day Adventist church, refuses to work from sundown on Friday to sundown on Saturday, either for her employer, when he—22 months after she became an Adventist—changes to a six-day week, or for anyone else, but who is willing to work at any decent job either in her accustomed textile industry or in any other industry, and who resides in a city where all the 150 other members of her church, all practicing the same abstention from Friday evening-Saturday, are gainfully employed and experience no particular difficulty in obtaining jobs—Whether the state statute, as so construed and applied,

(1) Violates the First Amendment protection against impairment of the free exercise of religion as absorbed into the Fourteenth Amendment.

(2) Is so arbitrary and discriminatory as to violate (a) the due process clause of the Fourteenth Amendment including the inhibitions of the First Amendment against abridgement of the free exercise of religion or (b) the equal protection clause of the Fourteenth Amendment.

STATUTES INVOLVED

The South Carolina Unemployment Compensation Law provides (S.C. Code (1952)):

> SEC. 68-113. BENEFITS ELIGIBILITY CONDITIONS. An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:
>
> . . . .
>
> (3) He is able to work and is available for work

. . . . .

SEC. 68-114. DISQUALIFICATION FOR BENEFITS.

Any insured worker shall be ineligible for benefits:

. . . . .

(2) *"Discharge for misconduct."* If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request and continuing not less than one nor more than the next twenty-two consecutive weeks (in addition to the waiting period)

. . . .

(3) *"Failure to accept work."* If the Commission finds that he has failed, without good cause, (a) either to apply for available suitable work, when so directed by the employment office or the Commission, (b) to accept available suitable work when offered him by the employment office or the employer . . . such ineligibility shall continue for the week in which such failure occurred and for not less than one nor more than the five next following weeks (in addition to the waiting period)

. . . .

(a) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals. . . . .[3]

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[3] This subsection (a) was added to section 68-114 by amendment in 1955. S.C. Acts 1955, No. 254, secs. 17 and 18, 49 Stats. at L. 480. Apparently through oversight, it has not yet been carried into the Code. Cf. S.C. Code (1952) sec. 68-114 (Supp. 1960).

STATEMENT

This action was initiated by appellant's petition in the Court of Common Pleas for Spartanburg County, South Carolina (Tr. 20-23) under section 68-165, S.C. Code (1952) to review and reverse the decision of the state Employment Security Commission that plaintiff was:

(1) ineligible for benefits in that she refused to take work on Saturdays because of her religious belief as a Seventh-day Adventist and hence was not "available for work" as required by sec. 68-113, S.C. Code (1952);

(2) disqualified for five weeks benefits because she had been "discharged for misconduct"—unexcused absences on Saturday (Tr. 18-20). The Court of Common Pleas affirmed the decision of the Commission (Tr. 29-36; App., *infra*, pp. 1a-7a). The Supreme Court of South Carolina affirmed (Tr. 41-48; App., *infra*, pp. 8a-25a). Bussey, J., filed a dissenting opinion (Tr. 49-54; App., *infra*, pp. 26a-36a).

There is no dispute in the facts of record.—Plaintiff-appellant, aged fifty-seven, had been employed in the Beaumont plant of Spartan Mills in Spartanburg, South Carolina as a spool-tender for thirty-five years (Tr. 4, 8) and had been so employed without interruption since August 8, 1938 (Tr. 6, 21). From the end of World War II and until June 6, 1959, Saturday work in this plant had been on a voluntary basis (Tr. 5). Appellant worked only five days a week, Monday through Friday, on the first shift—7 a.m. to 3 p.m. (Tr. 8-9).

On August 5, 1957, appellant became a member of the Seventh-day Adventist church (Tr. 13, 6).[4] The religious teaching of that church is that the Sabbath commanded by God commences at sundown Friday evening and ends at sundown on Saturday evening (Tr. 11) and labor or common work during that period is forbidden (Tr. 14). Appellant, as a member of the denomination, shares that belief and in the practice of her religious belief (Tr. 11-12) did not work during the Sabbath after she joined the church on August 5, 1957 (Tr. 13).

For twenty-two months after so joining the Seventh-day Adventist church, without being required to work, and not working, on Saturday, she continued her uninterrupted employment with Spartan Mills until June 5, 1959 (Tr. 5-6). Her employer changed to a six-day week on that day, posting a notice that all employees would be required to work on Saturdays thereafter (Tr. 5-6, 9). Appellant explained to her employer that she could not work on Saturday because it was her Sabbath, revealed by God (Tr. 12), and thereafter, refusing and failing to work on Saturdays, she missed work on six successive Saturdays (Tr. 6, 10). She was discharged on July 27, 1959 (Tr. 9) solely because of her refusal to work on Saturday, her Sabbath (Tr. 6-12). Thereafter she applied to three other mills for employment but they were on a six-day week basis, as were most mills in the area (Tr. 10) and she remained unwilling to take any work that would require her to work on her Sabbath (Tr. 11). Appellant has at all times been willing to work in another mill or in any other industry

[4] At the hearing held October 2, 1959 (Tr. 6) she testified that she became a member of the Seventh-day Adventist church "two years ago the 6th day of this past August" (Tr. 13).

so long as she was not required to work on her Sabbath (Tr. 12).

The unquestioned evidence showed that, other than appellant and one other,[5] all of the approximately one hundred and fifty members of the Seventh-day Adventist church in Spartanburg are gainfully employed in that area and experience no particular difficulty in obtaining jobs although none works on the Saturday Sabbath (Tr. 13-14).

There was no evidence that in the area there were not numerous jobs requiring no Sabbath work and otherwise suitable for appellant; neither was there any evidence to suggest that any such jobs were presently open, or that appellant had been referred to them or failed to apply or accept any such job.

Appellant on July 29, 1959, filed her claim with the South Carolina Employment Security Commission for unemployment compensation benefits under the law. Sec. 68.1 et seq., S.C. Code (1952) (Tr. 3-4). The claims examiner found the appellant ineligible under sec. 68-113(3) because not "available for work" in that her refusal to work on Saturday made her "not available for work during the regular work week observed in the industry and area" in which she had worked (Tr. 4-5). He also held her "disqualified" under sec. 68-114(2) for a period of five weeks because discharged for misconduct—her unexcused Saturday absences (Tr. 4-5).

The affirming decision of the Referee or Appeal Tribunal (Tr. 16-18) was affirmed by the appellee Commission (Tr. 18-20).

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[5] In *Sally W. Lloyd* v. *Charlie V. Verner et al.*, pending on appeal to the Supreme Court of South Carolina, the facts are identical and the parties have stipulated to abide the result in this case.

On the petition of the appellant, the answers of the state commission and of the employer, Spartan Mills, both appellees here, and on the basis of the record made in the administrative proceedings, the Court of Common Pleas of Spartanburg County, affirmed (App., *infra*, pp. 1a-7a).

On appeal to the Supreme Court of South Carolina, appellant's exceptions asserted that the pertinent sections of the Unemployment Compensation Law, as construed, violated the free exercise of religion clause of the First Amendment included in the Fourteenth Amendment and violated the First Amendment as absorbed into the Fourteenth in denying appellant the protection and benefits available to those who observe Sunday as the Sabbath (Tr. 37-38).

The Supreme Court of South Carolina, in its opinion (App. *infra*, p. 9a) concluded (*id.*, p. 24a):

(1) Appellant was ineligible because not "available for work" under sec. 68-113(3), S. C. Code (1952) in that she was "unwilling to accept work in her usual occupation for the usual and customary days and hours under which the textile industry works."

(2) Appellant was properly disqualified for five weeks benefits, not on the ground assigned by the court below—misconduct under sec. 68-114(2)—but because under sec. 68-114(3) she had "failed, without good cause . . . to accept available suitable work when offered . . . by the employer."

In reaching these conclusions, the court first stated (*id.*, p. 16a):

> "The basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be

determined whether or not the claimant is actually and *currently attached to the labor market*, which in this case is *unrestricted availability for work*". (Emphasis supplied.)

As to eligibility.—The court, emphasized, by quotations, that to be "available", the claimant "must be able to and available for the work which he or she has been doing" (*id.*, p. 14a) and if he restricts his availability to hours or conditions "not usual in his occupation or trade" he is not available (*id.*, pp. 16a-17a).

The court then converted the six-day week requirement newly imposed by the appellant's employer into the "usual and customary". Although it had earlier in its opinion conceded that up until June 5, 1959, the employer plant had not required work on Saturday (*id.*, p. 9a) the opinion reaches the conclusion (*id.*, p. 19a):

> "Here, the appellant attempted to limit or restrict her willingness to work to certain days and a certain shift, *not usual* in the textile industry in the Spartanburg area . . . . *It is implicit* in the record that it is *usual and customary* for the textile plants in the Spartanburg area to operate on Saturdays and work was required of their employees on said days." (Emphasis supplied.)

From this, the conclusion that appellant was not "available", was then drawn (*id.*, p. 24a).[6]

[6] The dissenting opinion negatives the misleading implications of the majority opinion as to the facts. It states (*id.*, p. 28a):

> "The appellant here did not quit her employment of long standing and made no change in connection therewith which resulted in her discharge. She was faithfully discharging her duties, just as she had for thirty-five years, in compliance with what had been the established practice of her employer for

As to disqualification.—The court sustained the five-week disqualification but on a ground different from that adopted below. It invoked sec. 68-114(3) which disqualifies for failure to accept "available suitable work". Since this sets up basically the same test of availability, the opinion relies largely on the reasoning as to eligibility. It found no distinguishing difficulty with the presence in sec. 68-114(3) of the word "suitable", or with the provision of subsection 68-114(3)(a), added in 1955, requiring the Commission, in determining whether work is suitable for an individual, to "consider the degree of risk involved to his health, safety and morals". This, it held was a purely objective test i.e., the effect on the health, safety and morals of "any employee" (*id.*, pp. 21a-22a).

As to constitutional validity of the law as construed.—The court purported to restate the Federal questions raised by appellant (*id.*, p. 24a-25a):

> "The appellant asserts that if this Court concludes, as we have hereinbefore, such construction violates her rights to religious freedom and to the equal protection of the laws guaranteed by the First and Fourteenth Amendments to the Constitution of the United States . . . ."

It dismissed these contentions with the statement (*id.*, p. 25a):

> "However, our Unemployment Compensation Act, as [it] is hereinbefore construed, places no

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some fourteen years, and in keeping with her established, sincere and conscientious religious belief."

(*id.*, p. 29a)

Here the appellant was admittedly able to do and available for the work which she had been doing for many years, but which work the employer decided [to] change to a schedule which conflicted with her Sabbath.

restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.

Accordingly, the decree of the lower court was affirmed (*ibid.*).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The Supreme Court of South Carolina has ruled that the payment by the state of unemployment benefits under the state unemployment compensation law may be conditioned upon the surrender by the claimant of her right, in the exercise and practice of her religious belief, to abstain from gainful work from sundown Friday to sundown Saturday.

1. As construed and applied by the court below, the state statute imposes a substantial penalty on the exercise by appellant of her religious freedom under the First Amendment and the Fourteenth Amendment. If, because of her religious belief, she abstains from work on her Sabbath, the law, as construed, directly penalizes and punishes her unwillingness so to work at that time. The imposition of the financial burden of the penalty is equally as obnoxious as the exaction of a tax as a condition to the exercise of a First Amendment liberty. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 113; *Jones* v. *Opelika*, 319 U. S. 103, adopting per cur. on rehearing the dissenting opinion in 316 U. S. 584, 600-602, 607-609; *Follett* v. *McCormack*, 321 U. S. 573, 577.

Even if the withholding of the benefits be regarded as merely an indirect burden, its necessary effect must be to discourage and impede the observance of the Saturday Sabbath by those whose religious belief re-

quires such observance. The law, so construed, is therefore constitutionally invalid for the same reason. *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 461; *Bates* v. *Little Rock*, 361 U. S. 516, 523; see *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 402; *Braunfeld* v. *Brown*, 366 U. S. 599, 607. Invasion of appellant's constitutional right cannot be sustained as a mere incident or consequence of a regulation within the power of the State. The record here is clear that appellant is attached to the labor market; all 150 members of appellant's Seventh-day Adventist church in Spartanburg, all also unwilling to work on their Sabbath, are gainfully employed and experience no particular difficulty in obtaining jobs (Tr. 13-14). Hence, advancement of the policy and purposes underlying the law and its requirement of availability for work—to insure against involuntary employment of those who would otherwise be working if a job were unfilled—is in no way impaired by appellant's unwillingness to work on Saturday. The Court below chose merely to ignore these facts of record.

2. The statute is so arbitrary and discriminatory as to violate the due process clause of the Fourteenth Amendment. We may concede that the State has no affirmative duty to grant unemployment compensation benefits. But, having embarked on the program, it may not impose as a condition to the enjoyment of the privilege the relinquishment or surrender of constitutional rights not germane to the enactment. It is no answer to say that appellant is not compelled to accept the benefits. *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532 (1922); *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 593-594 (1926); cf. *Hannegan* v. *Esquire*, 327 U. S. 146, 156 (1946).

There is no room here for suggestion that payment of the benefits claimed might finance activities detrimental to the public interest (*Speiser* v. *Randall*, 357 U. S. 513, 527; cf. *Garner* v. *Board of Public Works*, 341 U. S. 716, 721) or that the condition, as applied here, is essential to protect the effectiveness of the law that confers the benefit (cf. *Oklahoma* v. *Civil Service Comm'n*, 330 U. S. 127, 143).

Payment of a Government annuity, though gratuitous, may not be withheld as a punishment for exercise of a liberty or right guaranteed by the Constitution. *Steinberg* v. *United States*, 143 C. Cl. 1, 163 F. Supp. 590, 591 (1958). Though it be a mere privilege, tax-exemption may not be conditioned on surrender of the right to procedural due process. *Speiser* v. *Randall*, 357 U. S. 513, 518; *First Unitarian Church* v. *Los Angeles*, 357 U. S. 545. Public office as a notary may not be conditioned on surrender of religious freedom (*Torcaso* v. *Watkins*, 367 U. S. 488, 495). Nor may public employment be conditioned on surrender or waiver of constitutional rights. *Wiemann* v. *Updegraff*, 344 U. S. 183, 192 (1952); *Slochower* v. *Board of Education*, 350 U. S. 551, 558; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278. The right to unemployment compensation may not be conditioned on surrender of the right of free speech. *Syrek* v. *California Insurance App. Board*, 54 Cal. 2d 519, 532; 354 P. 2d 625 (1960). Neither may surrender of constitutional rights be made the condition to enjoyment of the privilege of use of state property for meetings (*Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885 (1946) or enjoyment of the privilege of public housing (*Lawson* v. *Housing Authority of Milwaukee*, 270 Wis. 269, 70 N. W. 2d 605, cert. denied

350 U.S. 882). So here, it is submitted, surrender of appellant's religious freedom to worship God on her Sabbath may not be made a condition of her right to unemployment compensation.

3. The statute as construed, deprives appellant of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. The state court modified its statement that the statute requires unrestricted availability (App., *infra*, p. 16a). It indicated that because of the provisions of sections 64-4 and 64-5, S. C. Code (1952), an employee, especially a woman, would not, to be eligible for unemployment benefits, be required to be available for work on Sunday (*id.*, p. 24a). Reference to these statutes (App., *infra*, pp. 40-41) shows that the prohibition against Sunday employment is based on religious grounds since they further provide that, even in the case of permitted Sunday work in national emergency manufacturing plants, ". . . no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work" (*id.*, pp. 40, 41). Thus, the unemployment compensation law, as construed, discriminates between believers of different religious faiths and deprives appellant of equal right to benefits solely on the basis of a classification without basis in reason or effectuation of the purposes of the law. The impartiality required of the State with respect to different religions under the First Amendment (*Everson* v. *Board of Education*, 330 U. S. 1, 15, 18; *McCollum* v. *Board of Education*, 333 U. S. 203, 210; *Zorach* v. *Clauson*, 343 U. S. 306, 313-314) cannot be less rigid under the equal protection clause of the Fourteenth.

4. The question whether unwillingness, for religious reasons, to take employment involving work on the

Saturday Sabbath, is protected by the federal constitution against surrender as a condition to enjoyment of unemployment compensation is one of broad and continuing general importance to a large number of citizens. Three state courts have upheld a claimant's right to compensation despite his refusal to work on Saturday, without passing on the constitutional questions, and merely as a matter of statutory construction. *Swenson* v. *Michigan Employment Security Commission*, 340 Mich. 430, 65 N.W. 2d 709 (1954); *Tary* v. *Board of Review*, 161 O.S. 251, 119 N.E. 2d 56; *In re Miller*, 243 N.C. 509, 91 S.E. 2d 241 (1956). In *Kut* v. *Albers Super Markets, Inc.*, 146 O.S. 522, 66 N.E. 2d 643 (1946) prior to 1949 amendment of the Ohio law the constitutional right and protection was denied. But non-availability was also based on a second ground—refusal to accept employment in the claimant's old job involving no Saturday work. This Court dismissed appeal on the stated ground that the decision below was "based upon a non-federal ground adequate to support it". *Kut* v. *Bureau of Employment Compensation*, 329 U. S. 669.

As indicated in the dissenting opinion of Bussey, J., in the court below (App., *infra*, p. 32a) the authorities of a large number of other states have been required, at the administrative level, to pass upon the question here raised. Most have been favorable to the constitutional right. Some have not.

The question will obviously recur. Unfortunately, the amounts involved seldom justify, and the claimants in such cases are usually ill-prepared to bear, the expense necessary to obtain judicial vindication of their rights.

CONCLUSION

It is submitted that authoritative determination of the questions presented on this appeal is pivotal in the right administration of the legislation on unemployment compensation in most of the States. Because of the large number of persons affected, the issues must be regarded as of general importance.

If, because of the form of the state court's statement of the federal constitutional questions presented by appellant and considered by it (App., *infra*, p. 25a) this Court should conclude that the appeal jurisdiction is not properly invoked, it is submitted that the considerations stated above amply justify the exercise of the discretionary certiorari jurisdiction of this Court. 28 U.S.C. sec. 2103.

Respectfully,

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